

### REMARKS/ARGUMENTS

The above-identified patent application has been reviewed in light of the Examiner's Office Action dated September 4, 2009. In view of the amendments and arguments presented herein, Applicant respectfully submits that the claims are in condition for allowance.

The Examiner has asserted that the Amendment of August 26, 2005 introduces new matter and thus the amended drawings and disclosure presented therein have been objected to. Claims 11, 14, 16, 21 and 23 have been rejected under 35 U.S.C. §112, second paragraph, as being indefinite. Claims 11, 12, 14 and 21-23 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Gebert (CH 346187) and Fritz. Claims 13 and 15 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Gebert, Fritz and Ball '241. Finally, Claims 16-20 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Gebert, Fritz and further in view of Ball '931 and Ball '241.

Claims 11, 14, 16, 21 and 23 have been amended. Claims 1-10 were previously cancelled. Accordingly, Claims 11- 23 are pending.

#### **Amendment of June 9, 2009**

The Examiner has objected to the proposed amendment to the specification and the proposed drawing correction to Fig. 8 filed June 9, 2009. With respect to the Examiner's assertion that the proposed amendment did not comply with Rule 121, Applicant provides amendments with the proper markings herein. It is believed that the amendments to the specification now comply with Rule 121 and that they address the Examiner's objection under 35 U.S.C. §132(a) concerning the paragraph beginning on page 9, line 25 (paragraph 2 of the Final Office Action). The amendment to the specification also addresses the objection to the disclosure related to various reference numbers (paragraph 3 of the Office Action).

The Examiner has also indicated that the proposed drawing correction to Fig. 8 filed June 9, 2009 contains new matter. Generally, the Examiner asserted that the disclosure as originally filed lacks a specific teaching of cutting membrane 26A that is associated with a waste water drain. Fig. 8 has been amended to remove all references to membrane 26A. In addition, the paragraph beginning on page 9, line 25 has been amended to remove all references to membrane 26A.

### **Claim Rejections 35 USC §112**

The Examiner has rejected Claims 11, 14, 16, 21 and 23 as being indefinite. More specifically, the Examiner has alleged that the use of the phrase “adapted to” in Claim 11 is indefinite because it is unclear whether the bathtub is positively claimed.

Claim 11 has been amended to positively claim the bathtub. Claims 14 and 16, which depend on Claim 11, have also been amended to positively claim the bathtub and are thus believed to be definite.

In contrast, Claim 21 has also been amended to more succinctly indicate that the bathtub is not part of the claimed apparatus. For example, Claim 21 has been amended to indicate that a nut element associated with said overflow pipe is adapted to secure said the overflow pipe to the end of the bathtub. It is believed that the use of “adapted to” in Claim 21 and Claim 23 are definite.

More specifically, the bathtub is not part of the invention of Claim 21. The bathtub is the environment that the claimed subcombination of elements is *adapted to* be interconnected to. The law is clear that components that are “adapted to” be used in conjunction with claimed elements do not limit the claim. In Re Dean 291 F.2d 947 (C.C.P.A. 1961). In Re Dean concerned a patent application that claimed a camera having a shutter mechanism with a pair of electro-responsive devices that were “adapted to be individually coupled to said [shutter actuating] elements”. *Id.* at 949. The court disagreed with the decision of the Patent Office Board of Appeals that construed the words “adapted to be individually coupled to said [shutter-actuating] elements” to mean a combination of the timer with a shutter. The court stated: “[t]o state mere adaptability of these parts of the timer to perform the coupling function does not import into the claim the shutter to which they are coupled.” *Id.* at 951. Similarly, here, by stating that the claimed elements are “adapted to” be joined to a bathtub does not import the bathtub into the claim.

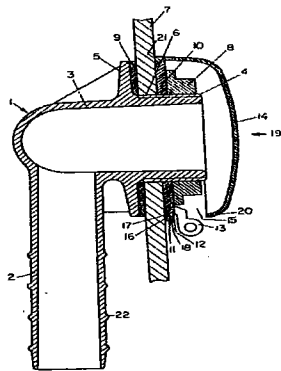
Thus, in view of the amendments to Claims 21 and 23 and well-settled precedent, it is respectfully submitted that there can be no confusion as to whether the bathtub is part of Claims 21 and 23. Accordingly, withdrawal of the rejection is respectfully requested.

### Claim Rejections 35 USC §103 - Gebert and Fritz

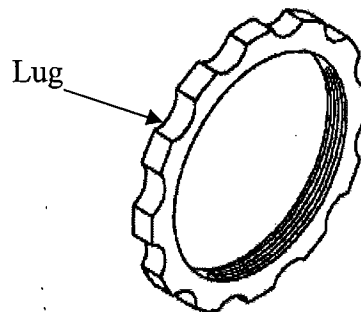
The Examiner has rejected Claims 11, 12, 14 and 21-23 as being obvious in view of a combination of Gebert (CH 346187) and Fritz. Gebert has been cited for disclosing the majority of the features claimed and Fritz has been cited primarily for disclosing a removable diaphragm. Applicant traverses this rejection as the combination of Gebert and Fritz does not meet the *prima facie* test for obviousness. Alternatively, Applicant requests Fritz be removed as citable prior art since the claimed invention was invented prior to the filing date of Fritz.

#### *Gebert and Fritz*

Obviousness requires a suggestion of all the elements of a claim. CFMT, Inc. V. Yieldup Int'l Corp., 349 F.3d 1333, 1342 (Fed. Cir. 2003). Independent Claim 11 requires a “nut element comprising at least one lug extending radially therefrom” for engagement with a cap (see the nut on the figure provided below). Claim 21 requires a threaded “nut element comprising a plurality of lugs extending radially therefrom” for engagement with a cap (see the nut on the figure provided below). Contrary to the Examiner’s assertions, Gebert does not disclose a nut element comprising at least one lug, or a plurality of lugs, extending radially therefrom. Gebert discloses a non-threaded adapter ring (10) that maintains a covering element (14) in place. Gebert does not disclose anything that can be construed as the claimed nut element.



Gebert



Nut of the Instant Application

The Examiner is incorrect that Gebert discloses a nut with the claimed lugs. Gebert states: “[i]nstead of only an annular inner projection 16, there could also be provided a multiple number of inner projections. . .”. Gebert’s inner projection 16 of a covering element (14) is shaped in a specific way to facilitate radial flexure so as to allow the covering element (14) to interface with a non-threaded adapter ring (10). In contrast to the present invention, Gebert discloses three separate components: a nut (8), an adapter ring (10) and a covering element (14), with the covering element (14) being in contact with the non-threaded adaptor ring (10) and not the nut (8). The present claimed invention is distinguished from Gebert’s disclosure and teaching by having just two components involved to achieve the desired objective, e.g. the claimed invention employs a nut element having radially extending lugs around its periphery that engage directly with a cap design to be detachably engagable with the nut element. Gebert thus teaches away from the claimed two-component relationship by directing one of skill in the art to use three components requiring more parts, proper sequential construction and placement thereof, creating more costs, effort and inconvenience, etc.

Indeed, the cap of Gebert may be viewed as difficult to correctly mount. More specifically, the adapter ring (10) includes an eyelet (13) that must be positioned downwardly in order to properly receive the chain and stopper. Thus, the adapter ring (10) must be precisely placed onto the overflow port in order to ensure the eyelet (13) will be positioned in the correct location after installation. The claimed invention does not burden the installer by requiring this unduly complex interconnection scheme.

Furthermore, a prior art reference must enable one of ordinary skill in the art to make the invention without undue experimentation. Finisar Corp. v. DirecTV Group, Inc., 523 F.3d 1323, 1336 (Fed. Cir. 2008) (citing In re Omeprazole Patent Litig., 483 F.3d 1364, 1379 (Fed. Cir. 2007)). In other words, the prior art must enable the claimed invention. Minn. Mining & Mfg. Co. v. Chemque, Inc. (3M), 303 F.3d 1294, 1301 (Fed. Cir. 2002). Gebert does not enable, among other things, the claimed “nut element comprising a plurality of lugs extending radially therefrom”. The sole figure of Gebert and related description is not sufficiently enabling to put the public in the possession of the claimed “nut element comprising a plurality of lugs extending radially therefrom”. More

specifically, the figure of Gebert does not show all the claimed structural features and how they are put together. Jockmus v. Leviton, 28 F.2d 812 (2d Cir. 1928).

#### *Fritz*

Withdrawal of the rejection based on a combination of Fritz and Gebert is requested. As the evidence reflects, the claimed invention enjoys a date of conception that predates the filing date of Fritz, and the requisite diligence existed from the date of conception until constructive reduction to practice (i.e., filing date of the '724 application and applications related thereto).

The Examiner seems to have ignored the sworn statements as to the date of invention of inventor Ball and Mr. Carlson. It is respectfully submitted that the Declarations are proper and are sufficient to swear behind Fritz.

Accordingly, because Fritz is not prior art, it cannot be combined with Gebert to properly support a §103 rejection. In any event, as demonstrated above, Gebert is different in several respects and Fritz does not cure such deficiencies. Thus withdrawal of the rejection to Claims 11, 12, 14 and 21-23 is respectfully requested.

#### **Claim Rejections 35 USC §103 - Gebert, Fritz and Ball '241**

The Examiner rejected Claims 13 and 15 as being obvious in view of a combination of Fritz and Ball. Generally, Gebert has been cited as disclosing the majority of the features claimed and Fritz has been cited for disclosing a removable diaphragm. Ball has been cited for teaching a cutting instrument. For the reasons outlined above, Applicant asserts that the combination of Gebert, Fritz and Ball '241 do not include each of the elements claimed.

Accordingly, Claims 13 and 15 are believed to be allowable and withdrawal of this rejection is respectfully requested.

#### **Claim Rejections 35 USC §103 - Gebert, Fritz, Ball '931 and Ball '241**

The Examiner rejected Claims 16-20 as being obvious in view of a combination of Gebert, Fritz, Ball '931 and Ball '241. Generally, Gebert has been cited as disclosing the majority of the features claimed and Fritz has been cited for disclosing a removable diaphragm. The Ball references have been cited for disclosing a bath tub plumbing

system, etc. For the reasons outlined above, Applicant asserts that this combination of references does not include each of the elements claimed. Alternatively, it is requested that Fritz be removed as citable prior art.

Accordingly, Claims 16-20 are believed to be allowable and withdrawal of the §103 rejection is therefore requested.

### **Conclusion**

Applicant notes that none of the rejections of this Final Office Action are based on Oropollo. Thus it is understood that the previously-submitted Declarations were sufficient to “swear behind” Oropallo.

In view of the recently announced USPTO Task Force Objectives that include the goal of “reaching out to applicants,” reducing rework, encouraging examiner initiated interviews, etc, Applicant would appreciate any definite suggestions as to how best to address the Examiner’s concerns, if any, after reviewing this Amendment and Response After Final. It is noted that the Examiner's action should be constructive in nature and, when possible, should offer a definite suggestion for correction. MPEP 707.07(j). That is, it would be appreciated if the Examiner would “reach out” and contact Applicant’s counsel to “work toward defining the metes and bounds of the invention to be patented.” See In re Zletz, 893 F.2d 319, 321-22 (Fed. Cir. 1989).

Notwithstanding the foregoing, it is also respectfully requested that the amendments outlined above be entered into the record. That is, Applicant and Examiner have argued the relevance of Gebert *ad nauseam* and it is respectfully requested that these amendments be entered in contemplation of an appeal to primarily decide that issue and the sufficiency of the Declarations as they apply to Fritz.

Applicant has made good faith *bona fide* attempt to advance the application by distinctly and specifically pointing out the supposed errors in the Examiner's action and have further attempted to reply to every ground of objection and rejection in the prior Office action by presenting arguments pointing out the specific distinctions believed to render the claims patentable over the applied references. Applicant requests that any objections or requirements as to form not necessary to further consideration of the claims be held in abeyance until allowable subject matter is indicated.

Based upon at least the foregoing, Applicant believes that all pending claims are in condition for allowance and such disposition is respectfully requested. In the event that a telephone conversation would further prosecution and/or expedite allowance, the Examiner is invited to contact the undersigned.

Respectfully submitted,

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